Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-1064

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS

NORMAN J. WATKINS
Deputy Attorney General
BARRY A. ROTH
Assistant Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General

Department of Justice
Capitol Annex Bldg.
Harrisburg, Pa. 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

ERRATA

BRIEF FOR APPELLANTS

No. 75-1064

Jack B. Kremens, et al.

v.

Kevin Bartley, et al.

Page iv—Second line from the bottom, 28 U.S.C. §2281 rather than §22811.

Page 19—Last line of second full paragraph should read §2281 rather than §22811.

Page 38—Fourth line of last paragraph should read: "Moreover, proof of delinquency must meet the traditional heavy burden of beyond a reasonable doubt." rather than ". . . must *not* meet . . . ."

Page 55—Last line of first paragraph should read ". . . conclusion in Edelman exist and apply in this case."

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OPINIONS BELOW

The majority and dissenting opinions of the District Court are reported at 402 F. Supp. 1039. Copies of the opinons are set forth in the Appendix at (783a-823a).

JURISDICTION

The decision of the District Court and its final order were entered on November 17, 1975. *Bartley v. Kremens,* 402 F. Supp. 1039. A notice of appeal was filed on November 28, 1975. Probable jurisdiction was noted on March 22, 1976.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253.

STATUTES AND REGULATIONS INVOLVED

STATUTES

Mental Health and Mental Retardation Act of 1966,
50 P.S. §4402 et seq.

§4402. **Voluntary admission; application, examination and acceptance; duration of admission**

(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application for admission has been made under the provisions of section 402(a) (2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of section 402(a) (2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

(d) Each admission under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is admitted, to determine whether continued care is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation may permit.

Where the admission is under the provisions of section 402(a) (2), the person admitted shall be informed at least each sixty days of the voluntary nature of his status at the facility.

§4403. **Voluntary commitment; application, examination and acceptance; duration of commitment**

(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods

not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

(d) Each commitment under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is cared for, to determine whether continued care and commitment is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation shall permit.

Where the commitment is under the provisions of section 403 (a) (2), the person committed shall be informed at least each sixty days of the voluntary nature of his status at the facility.

§4405. **Commitment for emergency detention**

(a) Whenever a person appears, by reason of his act or threatened acts, to be so mentally disabled as to be dangerous to himself or others and in need of immediate care, he may be taken into custody for the purpose of examination, provided that:

(1) Only a relative, guardian, friend, individual standing in loco parentis to the person believed to be mentally disabled, executive Officer or authorized

agent of a governmental or recognized nonprofit agency providing health or welfare services, or a police officer may take such person into custody and then only upon written application approved by the administrator or his delegate, and

(2) The acts or threats which give cause to believe the person to be mentally disabled and in need of immediate care are overt, demonstrate a clear and present danger to self or others and are set forth in the application.

(b) Immediately upon being taken into custody, such person shall be taken with the approved application for examination to a physician or designated facility for examination on an emergency basis: (i) When examination is made by a physician who determines that such person is in need of immediate emergency care in a facility, he shall so certify on the aforementioned application and upon request, local police or State police shall forthwith transport such person to such designated facility where application shall be presented, the certificate filed with the facility, and the person thereby committed for emergency care. (ii) When the examination is made at a designated facility and it is determined by an examining physician that the person is in need of immediate emergency care, the examining physician shall file the required certificate and the commitment of such person for emergency care thereby shall be effected.

(c) When the application is not made by a relative or the guardian, the director, upon reception of the person named in the application, shall notify the appropriate relative or the guardian of the commitment of such person.

(d) If the examining physician shall determine that any person taken into custody by a police officer is not in need of immediate emergency care in a facility, and the person in custody has committed a criminal act, the police officer shall take such person to the proper issuing authority to be dealt with according to law. In all other cases such person shall be returned to the place where he was taken into custody and released.

(e) No person who proceeds under the provisions of this section shall be held civilly or criminally liable therefor, unless he acted maliciously and did not have probable cause to believe that the person taken into custody was suffering from mental disability.

(f) Any person committed under this section may be detained for a period of not more than ten days. If during this period the director finds that such person requires further care, he may admit the person on a voluntary commitment or notify the applicant (other than a police officer), or the administrator of the county of the person's residence, to make further application for such person's commitment under other provisions of this act.

§4406. **Civil court commitment**

(a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

(1) The petition may be made by a relative, guardian, friend, individual standing in loco parentis or by the executive officer or an authorized agent of a governmental or recognized nonprofit health and welfare organization or agency of any responsible person.

(2) The petition shall set forth the facts upon which the petitioner bases his belief of mental disability and the efforts made to secure examination of the person by a physician.

(3) Said court upon consideration of such petition shall: (i) issue a warrant requiring that such person be brought before said court; (ii) fix a date for a hearing which shall be as soon as the warrant is executed, and (iii) notify the parties in interest.

(4) After hearing, said court may: (i) order an immediate examination by two physicians appointed by said court, or (ii) order the commitment of the person believed to be mentally disabled, to a facility for a period not exceeding ten days for the purpose of examination. If the examination can be accomplished by partial hospitalization said court may so direct.

(b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment.

In its order of commitment, said court may permit partial hospitalization or outpatient care, or if at any time thereafter the director shall determine such partial hos-

pitalization or outpatient care to be beneficial to the person so committed, the same may be permitted by said court upon application by the director.

§4426. **Habeas corpus; discharge by order of court**

(a) Every person committed or detained in a facility by reason of the provisions of this act or anyone acting on his behalf, may at any time, petition for a writ of Habeas Corpus and, except as hereinafter provided, said petition shall be filed in accordance with the provisions of the act of May 25, 1951 (P.L. 415).

(b) Said petition may be based upon the following grounds:

(1) The insufficiency or illegality of the proceedings leading to such person's commitment, or,

(2) Although the commitment proceedings were proper, such person's continued detention or hospitalization is not warranted by reason of mental disability. Where the petition is based on this ground: (i) it shall be accompanied by the affidavit of a physician stating that he has examined the person and is of the opinion that such person is not mentally disabled, or that such mental disability does not require care or treatment in a facility, and (ii) the burden of proof shall rest upon the director responsible for such person's continued detention.

(c) Jurisdiction and venue is hereby conferred upon the several courts of the Commonwealth to issue writs of Habeas Corpus filed under this act as follows:

(1) A petition filed under section 426 (b) (1) may be filed: (i) where committed by a court, only

in the same court, or (ii) where committed under sections 404 or 405 of this act, only in the court of the county where the application for commitment was made.

(2) A petition filed under section 426 (b) (2) may be filed: (i) in the court which committed such person or the court of common pleas of the county where he is detained if a civil commitment was ordered, or (ii) where a criminal charge is pending, in the court having jurisdiction of the charge or which committed him or the court of the county where he is detained, or (iii) where committed by a court where a criminal act was in any way otherwise involved in the proceedings leading to commitment, only in the same court which committed such person.

(3) If any petition under section 426 (b) (2) is filed in a court other than the court of the county in which the person is detained, the petition may be transferred for disposition by the court in which it was filed to the appropriate court of the county in which the person is detained.

REGULATIONS

Volume 3, Pennsylvania Bulletin, p. 1840
Department of Public Welfare

Additional Procedural Safeguards for Juveniles Admitted to Institutions

The Department of Public Welfare by this Order adopts additional procedural safeguards for juveniles ad-

mitted to institutions pursuant to §402 and §403 of the Mental Health and Mental Retardation Act.

Notice of the proposed rule making was published in 3 Pa. B. 536, March 24, 1973.

After consideration of the views presented by interested persons, the regulations are adopted with some changes. Additions have been made in Paragraphs 1, 2, 6, 7 and the form of notification to permit referral of mentally retarded juveniles to institutions by either a pediatrician, or general physician or psychologist. A new paragraph has been written to reflect whether the juvenile is capable of understanding the notification form. In these regulations, the word "applicant" shall refer to the person who signed the juvenile in while the word "juvenile" shall refer to any youth 18 years of age or younger. Several comments urge that the role of the Public Defender's Office be replaced by a legal service program; however, the Public Defender Act, December 2, 1968 P.L. 1144, (No. 358) §1 *et seq.*, (16 P.S. 9960.6(a), (c), specifically makes the Public Defender responsible for persons who are or may be subject to commitment under the Mental Health and Mental Retardation Act of 1966. To the extent, however, that Legal Services other than the Public Defender are readily available, such Legal Services may be utilized in lieu of the Public Defender's Office and §5, §6 and §9 of these regulations have been changed accordingly. These regulations shall not be interpreted to permit direct intake into state-operated facilities. Although the Department is adopting these regulations, it will evaluate the procedures at the end of six months. If necessary, the Department will at that time hold public hearings.

The regulations hereby adopted are adopted pursuant to Article 2, §201 of the Mental Health and Mental Retardation Act of 1966, Act of October 20, 1966, No. 6, Third Special Session.

The Department of Public Welfare finds:

1. That public notice of intention to adopt the administrative regulations adopted by this Order has been duly given pursuant to §§201 and 202 of the Commonwealth Documents Law (45 P.S. §§1201 and 1202) and the regulations thereunder, 1 Pa. Code, §§7.1 and 7.2.

2. That the adoption of the regulations in the manner provided in this Order is necessary and appropriate for the administration of the Mental Health and Mental Retardation Act of 1966.

The Department of Public Welfare, acting pursuant to the Public Welfare Code, and the Mental Health/Mental Retardation Act of 1966, orders:

(A) The regulations of the Department of Public Welfare are amended to read as set forth in Annex A to this order.

(B) The Secretary of the Department of Public Welfare shall submit this Order and Annex A hereto to the Department of Justice for approval as to legality as required by law.

(C) The Secretary of the Department of Public Welfare shall duly certify this Order and Annex A hereto and deposit same in the Legislative Reference Bureau as required by law.

(D) This order shall take effect upon publication.

(s) _____

Secretary of Public Welfare

ANNEX A

Rules Relating to Persons 18 Years of Age or Younger Admitted to Mental Health or Mental Retardation Institutions Pursuant to §§402 and 403 of the Mental Health and Mental Retardation Act

1. All juveniles aged 18 and younger to be admitted to an Institution must be referred from a recognized medical facility, Mental Health/Mental Retardation therapist or Mental Health Agency; however, mentally retarded juveniles may be referred by either a pediatrician, or general physician or psychologist.

2. This referral must be accomplished by a psychiatric evaluation and that report must indicate with specificity the reasons that the person requires institutional care; however, a medical or psychological evaluation may accompany the referral of a mentally retarded juvenile;

3. The Director of the Institution or his delegate, shall have conducted an *independent* examination of the proposed juvenile, and if his results disagree with the professional's opinion, the Director, or his delegate, shall discharge the juvenile;

4. The telephone number and address of the juvenile's parents or the person who is requesting admission for the juvenile must accompany the referral;

5. Within 24 hours after the juvenile's admission, every youth who is at least 13 years of age must receive written notification (which he signs) explaining his rights indicating that he will be given a status report periodically of his condition; that he can contact by telephone or by mail his parents or the person who requested his admission; and that he will be furnished with the number

of counsel (Public Defender's number; Legal Services) that he can call for representation. An appropriate person shall explain this notice (attached);

6. In the event that a juvenile whose chronological age is 13 or older objects (either orally or in writing) to remaining in the Institution, the Director, or his delegate, *if he feels it is necessary for the youth to remain*, may continue the institutionalization for two business days during which time he shall notify the applicant and the referral unit so that either party may institute a 406 proceeding. During that same two-day period, the Director, or his delegate, shall notify the Public Defender's Office or notify Legal Services readily available of the juvenile's need for legal representation. If a 406 proceeding is begun during the two day period, the juvenile shall remain institutionalized. If the applicant cannot be located and the Director, or his delegate, feels that the juvenile does not require institutionalization, the Director or his delegate, shall direct the Base Service Unit to assume responsibility of providing for the juvenile's aftercare. However, if the Director, or his delegate, feels that the juvenile requires institutionalization, he shall direct the Base Service Unit to file a 406 proceeding within two days after failure to locate the applicant;

7. The juvenile's counsel shall be furnished with the juvenile's evaluation from the referral unit, with a psychiatric evaluation from the Institution, and with a written report of the reasons to institutionalize the juvenile.

8. If the staff members of the facility giving notice to the patient determines that the patient is incapable of understanding the notification, it shall be written on the notification;

9. Juveniles aged 13 and older shall be given the following notice:

RIGHTS OF CHILDREN UNDER §402 and §403

You have currently been admitted to the _____ _____ Institution for observation and treatment. This voluntary admission procedure was instituted by _____ on _____ (date). You can call the applicant at Telephone Number _____ _____or you can write the applicant at _____ _____. The purpose in having you admitted to this facility is to help you overcome problems you are experiencing and to return you to the community as soon as possible. Before we accepted you, you must realize that a (circle which one) psychiatric, medical, or psychological opinion was given to us by _____. Also, the Director of this Institution had a (circle which one) psychiatric, medical, or psychological examination conducted so that he could be thoroughly appraised and certain that you could benefit in receiving care and treatment at this Institution.

If you object to remaining in this Institution, you are advised that we shall contact the Public Defender's Office to make other suitable arrangements to obtain legal counsel for you. We will provide you with the telephone number of the attorney who has been contacted on your behalf. We will require two working days from date of your objection to remain, in order to make certain that you will be afforded counsel. At the same time, the Director, or his delegate, of this Institution shall notify the applicant of his desire to require you (sic) hospitalization for your benefit.

A member of our staff shall explain this written letter to you and we ask you to sign it, which will evidence that you have a copy of this letter and that it has been explained to you in detail. In the event that you have any questions, you can direct them to the person who is explaining this document to you or you may contact this office.

_____

Superintendent's Signature

_____

Patient's Signature

_____

Staff Member's Signature
Giving Notice to Patient

QUESTIONS PRESENTED

I. Whether a parent, acting on a physician's recommendation has the authority to admit his child to a mental facility without a hearing?

II. Whether the order in this case violates the Eleventh Amendment or alternatively, violates the Rule of *Preiser v. Rodriguez?*

STATEMENT OF THE CASE

In 1971 and 1972 each of the named plaintiffs in this case was admitted or committed to Haverford State Hospital. These plaintiffs were juveniles ranging in age from fourteen to seventeen at the time of their hospitalization.[1] The commitments were initiated by one or both of the juveniles' parents under the provisions of either Section 402 or 403 of Pennsylvania's Mental Health and Mental Retardation Act of 1966.[2]

As required by the Act, each of the plaintiffs received a complete psychiatric examination to determine whether he or she was in need of care and treatment at the hospital 50 Pa. Stat. Ann. §§402(b), 403(b). However, these children were not provided a hearing where, with the assistance of counsel, they could challenge either the basis of their parents' decision to seek psychiatric in-patient therapy for them or the medical findings and recommendations with respect to the necessity for such treatment.

As a result of their respective admissions and commitments this lawsuit was commenced on November 16, 1972 (23a). This action was brought against the superintendent of Haverford and certain named officials of the

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[1] For the purposes of this brief, the terms "juvenile" and "child" will be used interchangeably and will refer to persons eighteen or younger.

[2] The provisions of these Sections of the Mental Health and Mental Retardation Act of 1966 are fully set forth at pages 2-15 of this brief under the heading "Statutes and Regulations Involved." Moreover, this Act of 1966 throughout the remainder of this brief will simply be referred to as "the Act."

Pennsylvania Department of Public Welfare.[3] Moreover, the plaintiffs brought their claims under the Civil Rights Act and generally challenged the constitutionality of Sections 402 and 403 of the Act.

The plaintiffs have predicated their challenge exclusively on two theories. First it was asserted that the procedure which was used in their hospitalization violated the Due Process Clause of the Fourteenth Amendment. In this respect, it has been contended that the Act is unconstitutional in that it fails to require a broad array of procedural safeguards including the rights of notice, hearing, and appointed counsel if necessary, prior to the child's admission to a mental facility.

Secondly, the plaintiffs have claimed a violation of the Equal Protection Clause. The gravamen of their complaint in this regard is that certain procedural rights generally afforded adults by the Act have been denied them solely because of their status as juveniles. Specifically, they have asserted that the right to discharge themselves from voluntary admission and the right to a pre-commitment hearing, which rights are afforded adults under the Act, have not been afforded juveniles in violation of the Equal Protection Clause (19a-20a). In view of the disposition of this case on due process grounds the court did

[3] This action was brought and maintained as a class action, which class was described by the lower court as ". . . all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act (Act)." Moreover, the court specifically noted that this description was intended to encompass both emotionally ill and mentally retarded children (783a).

not address this claim, and similarly the appellants[4] will not address this issue separately for if there is no Due Process violation the same reasons would necessarily apply to defeat the Equal Protection claim.

This lawsuit does not in any way question the validity or quality of treatment that the plaintiffs received at Haverford State Hospital. The plaintiffs are exclusively challenging the procedure by which they were hospitalized.

Because the questions raised by this action were substantial, and because injunctive relief was sought from the operation of these statutes on the basis of their asserted unconstitutionality, a three-judge court was convened on January 19, 1973, pursuant to the provisions of 28 U.S.C. §22811.

However, shortly after this lawsuit was filed the Pennsylvania Department of Public Welfare promulgated regulations augmenting Sections 402 and 403 as they pertain to juveniles. These regulations greatly expanded the procedural protections afforded juveniles in these situations.[5] Briefly they require not one, but two independent psychiatric, psychological, or medical examinations both of which must conclude that hospitalization is necessary as a condition of continued hospitalization.[6] All children thirteen years of age or older must receive written notice of all his rights under the regulations including the right

[4] To avoid confusion the appellees will continue to be referred to as "plaintiffs" and the appellants as "defendants" throughout the remainder of this brief.

[5] The regulations are set out in full at pages 9-15 of this brief.

[6] For the remainder of this brief "medical" or "psychiatric" examinations are used interchangeably and are intended to also include "psychological" examinations where appropriate.

to be provided free counsel and the right to a hearing if he objects in any manner whatsoever to his continued commitment.

On the basis of constitutional deficiencies still perceived in those regulations, and after a fairly extensive evidentiary record had been created, the lower court, with one judge dissenting, held that Sections 402 and 403 of the Act violated the Due Process Clause of the Fourteenth Amendment (783a-813a). By its final order, entered almost four months after this decision,[7] the Court granted very broad declaratory and injunctive relief to the plaintiffs.

Briefly, the lower court ruled that children of any age were entitled to, and the defendants were required to provide (1) a "probable cause hearing" within seventy-two hours of hospitalization (defendants were required to serve prior written notice of that hearing upon the child and his attorney at least forty-eight hours beforehand); (2) a "post-commitment hearing" within two weeks of hospitalization (with a similar prior notice requirement); (3) "Counsel at all significant stages of the commitment," (4) the right to be present at all hearings and to confront and cross-examine witnesses as well as to present testimony on their own behalf (843a-852a).

The Court further ordered that within 120 days of the entry of its order each of the thousands of children then hospitalized in mental facilities either be discharged or recommitted in accord with the newly mandated procedures.

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[7] While the opinion was handed down on July 24, 1975, it took nearly four months for the parties to present their views on the appropriate relief and for the court to enter its order on November 17, 1975.

Finally, the Court directed that the Commonwealth judicial system provide all the necessary judicial resources to implement this order (846a).

Because of the sweeping nature of the relief granted and because of its overwhelming effect upon the government of Pennsylvania, and finally because of the impact of the decision in a societal context, a stay of this order was sought. On December 16, 1975, this Court granted a stay and this appeal followed. On March 22, 1976, probable jurisdiction over this appeal was noted.

SUMMARY OF ARGUMENT

I. A. The system of mental health admissions and commitments in Pennsylvania relative to juveniles generally recognizes the rights of the parent, with medical advice, to seek hospitalization for his child. However, regulations promulgated by the defendants do provide substantial protective procedures for children over the age of thirteen. A comparison of similar statutory schemes demonstrates that Pennsylvania compares very favorably in balancing the interests of the child with those of his parent when those interests collide.

B. With the exception of this case and its limited progeny there have been no other mental health cases presenting a conflict between the parent and his child. The lower court failed to recognize this important fact and accordingly found the existence of due process rights for children in one situation: state versus child; and applied those rights in a totally different context—child versus parent and doctor.

C. Juveniles' rights have been recognized by this Court in a very careful and deliberate manner. This Court has attempted to balance the need for accurate fact-finding with the desire for informality in delinquency proceedings. The considerations that have led to the recognition of these rights in the area of juvenile delinquency do not apply to the admission procedure for children to mental facilities. In the latter case the crucial determination is not of guilt or innocence, but rather whether or not a child needs psychiatric in-patient care.

Moreover, the underlying assumptions made by the lower court in ordering a full panoply of procedures are of doubtful validity, and more importantly create a misuse of judicial process. Physicians, not lawyers and judges should prescribe medical treatment. Institutional therapy is but one mode in a full spectrum of treatment and any dissatisfaction with that type of treatment is a social problem that should be dealt with legislatively, not by imposing purposeless judicial proceedings on the treatment process. Accordingly, this Court must reverse the decision of the lower court.

II. A. The retroactive portions of the injunctive relief granted by the lower court violate the Eleventh Amendment. This retroactive relief is no less offensive, in its fiscal impact, than was the order set aside by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974).

B. Alternatively the lower court's order for retroactive implementation violates the principles of federalism recognized by this Court in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Clearly the plaintiffs in this case had the complete remedy of habeas corpus available to them and, at the very least, they should not have been permitted to attack the legality of their custody by the means of a civil rights action as opposed to habeas corpus. Finally, these same notions of federalism were totally ignored by the lower court when it ordered that the thousands of hearings required to implement the retroactive portions of this order must be conducted by the Commonwealth Judiciary. The Judiciary was never made a party to these proceedings and there was no constitutional necessity for judicial hearings. Accordingly, the retroactive portions of the lower court's order should be set aside.

ARGUMENT

I. A PARENT, ACTING ON A PHYSCIAN'S RECOMMENDATION, HAS THE AUTHORITY TO ADMIT HIS CHILD TO A MENTAL FACILITY WITHOUT A HEARING

A. The Admission Process: an Overview

There presently are four means by which a person may be civilly committed to a mental health facility in Pennsylvania. The first method is referred to as voluntary admission.[8] By this procedure any adult may apply for admission and any parent or guardian may apply for his child's admission to a mental health facility. However, only after an examination concluding that the prospective patient is in need of care or observation has been completed may the patient be admitted. Moreover, by this procedure every adult patient is free to withdraw from the facility at any time. Juvenile patients, on the other hand, may only be withdrawn by the parent who admitted them.

Secondly, there is the voluntary commitment.[9] This procedure is generally the same as the voluntary admission procedure except that commitments under this section may not exceed thirty days, and ten days written notice to the

[8] 50 Pa. Stat. Ann. §4402. See pp. 2-3, supra, where this section of the Act is set out in full.

[9] See Section 403 at pp. 3-4, supra.

director of the facility is required to withdraw from the facility. Again, as with the voluntary admission, a juvenile may only be committed and withdrawn by his parent.

The procedure for an involuntary commitment is set forth in Section 406 of the Act.[10] Briefly, this procedure allows a third party to petition the appropriate county court for the commitment of a person thought to be in need of care and treatment because of a mental disability. Persons for whom involuntary commitment is sought are provided with notice, hearing and the right to counsel.[11] The provisions of this section make no distinction as to age.

Finally, there is the emergency commitment.[12] In this situation a person who is observed as being dangerous to himself or others and in need of immediate care may be immediately taken into custody for the purpose of examination. Custody of the individual for the initial examination is accomplished without notice or a hearing, however, a commitment under this section of the Act may not exceed ten days. Again, there is no distinction as to age contained in the emergency commitment provisions of the Act.

Several other features of the Pennsylvania system of mental health admissions bear noting. First, any person committed to a mental health facility may test the va-

[10] 50 Pa. Stat. Ann. §4406 is set out in full at pp. 6-8, supra.

[11] 16 Pa. Stat. Ann. §9960.6(c) provides that counsel be appointed for any person who is unable to afford counsel and who is the subject of an involuntary commitment action.

[12] See Section 405 of the Act which is set out in full at pp. 4-6, supra.

lidity of his custody by petitioning for a writ of habeas corpus in state court. 50 Pa. Stat. Ann. §4426. Moreover, a patient may demand an independent psychiatric evaluation to assure the accuracy of the diagnosis by which he stands committed to the facility. 50 Pa. Stat. Ann. §4423-(7). Additionally, the director of any facility may discharge any patient when that patient no longer needs care and treatment in the facility. 50 Pa. Stat. Ann. §4418, §4420.

Finally, the Pennsylvania Department of Public Welfare promulgated regulations under the Act. These regulations augment sections 402 and 403 of the Act (voluntary admission, and voluntary commitment) as those sections apply to juveniles and are set forth at pp. 2-4 of this brief. Although the general effect of these regulations has already been highlighted, it is important to examine these provisions more closely at this point. Parts 2 and 3 of the regulation guarantee that no juvenile may be admitted to a Pennsylvania facility unless two independent psychiatric examinations concur that admission is appropriate. If the results of these examinations do not concur in the need for hospitalization, the child may not be admitted. Moreover, within 24 hours of admission, every child over 13 years of age must be given oral and written notice of his rights, including the right to receive periodic reports of his condition, the right to communicate with family and counsel, and, if necessary, the right to be furnished counsel.[13] If the juvenile objects to continued treatment in the institution, counsel is immediately notified, as are all other interested parties. At this point, the child's hospitalization may continue for a maximum of

[13] Section 5 of the Regulations at pp. 9-15, supra.

two business days during which appropriate proceedings must be commenced under Section 406 of the Act, or the child must be discharged.[14]

This, then is the general statutory and regulatory framework within which children may be admitted or committed to mental health facilities in Pennsylvania. It is indeed an understatement to note that there are legal impediments confronting parents intent on "dumping" a child in a Pennsylvania mental health facility. In fact, Pennsylvania compares very favorably with most of her sister states in this regard. Defendants' examination of similar state statutes reveals that Pennsylvania's pre- and post-commitment standards and procedures for juveniles far exceed those provided in most, if not all, of those states.[15]

[14] Section 6 of the Regulations at pp. 9-15, supra; there is a possibility of a slightly extended institutionalization in the situation where the director of the facility involved cannot locate the applicant (parent or guardian) and continued hospitalization is recommended. In this case the involuntary civil commitment is then instituted by the appropriate base service unit (local mental health referral and treatment agency).

[15] Statutes reviewed: Hawaii R. S. Sec. 334-52; Idaho Code Ann. Secs. 66-318, 66-320; Ky. R. S. Sec. 202.015; 34 M. R. S. A. (Maine) Secs. 2291, 2293; Md. Ann. Code, Art. 59, Sec. 11(g); Mass. G. L. A. Ch. 123, Secs. 10, 11; Mich. C. L. A. Sec. 303.19a; Minn. Stat. Ann. Sec. 253A 03 subdiv. 1 and 2; V. A. M. S. (Missouri) Secs. 202.783, 202.790; Mont. Rev. Codes Ann. Sec. 38-406.2; Nev. R. S., Sec. 433.665; N. H. R. S. A. Secs. 135:22, 135:-22-a; N. J. S. A. Secs. 30:4-46, 30:4-48; N. M. Stat. Ann. Secs. 34-2-2, 34-2-4(2); N. Y. Mental Hygiene Law Sec. 71; N. D. Century Code Secs. 25.03-01, 20-03-06(2); Ohio Rev. Code Ann. Secs. 5122.02, 5122.03(a)(2); 43 Okl. St. Ann. Sec. 184; O. R. S. (Oregon) Sec. 426.220; Pa. Stat. Ann. tit. 50, Secs. 4402, 4403; S. C. Code Sec. 32-951; Tenn. Code Ann. Sec. 33-601; Utah Code Ann.

B. The Rights of Children in State Instituted Delinquency Proceedings Do Not Exist in This Case

1. Increased recognition of the legal rights of the mentally ill and mentally retarded [16] has in large part occurred as a result of litigation of relatively recent vintage.[17] Moreover, the majority of those cases dealt with securing various procedural rights for those who were, or were about to be institutionalized. In all of these cases the competing interests have been those of the patient or prospective patient and the state. And it has generally been found that the due process clause limits to some degree the power of the State to confine persons against their will for the sake of treatment. [18]

This case is different for it is not concerned with the power of the state *vis-a-vis* the individual. Here there is

Sec. 64-7-29; 18 V. S. A. (Vermont) Secs. 7503, 8001; Va. Code Ann. Sec. 37.1-65; R. C. W. A. (Washington) Secs. 72.23.-070, 72. 23.090; W. Va. Code Ann. Secs. 27-4-1, 27-4-3; W. S. A. (Wisc.) Sec. 51.10; Sec. 25.54, W. S. (Wyoming).

[16] Later criticism of the lower court's order in this case will demonstrate that the two groups, emotionally ill and mentally retarded, should have been treated separately. However, for the sake of brevity, both groups together will hereafter be referred to as "mentally ill".

[17] While there were early cases on the fringes of the controversy, see e.g. *In re Joseph* (sic) *Oakes,* 8 Law Rptr. 122 (Sup. Jud. Ct. Mass. 1845), as cited in J. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Cal. L. R. 840, 841 (1974), the significant inroads in this area were not made until the mid and late sixties.

[18] See e.g. *Jackson v. Indiana,* 406 U.S. 715; *In Re Ballay,* 482 F. 2d 648 (D.C. Cir. 1973); *Dixon v. Attorney General of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971).

a direct confrontation between the wishes of the child and his parent. Rather than state versus individual, in this case it is child versus parent. The voluntary admission of juveniles to a mental facility has been described as presenting a triangular configuration of competing interests, those of the parent, child and state. [19] And by this action the plaintiffs seek to severely diminish the parents' role in the decision to seek institutional care for their child.

The plaintiffs' theory is not complex: (a) unless one is free to leave an institution at will, one's hospitalization is not voluntary; (b) since children cannot come and go as they please against the wishes of their parents and physicians, they are involuntarily hospitalized; and (c) involuntary commitment in a mental hospital without a prior hearing and the right to counsel is a denial of liberty without due process of law. Their argument's simplicity amounts to little more than a "knee-jerk application of the [Fourteenth] Amendment" [20] which was unfortunately subscribed to almost *in toto* by the court below. As is the case with most simple solutions to complex issues, grave difficulties and serious questions have arisen which cause the need for a more probing analysis.

For instance, by the terms of the lower court's order there is absolutely no distinction made between the six month old severely retarded infant with brain damage and the seventeen year old emotionally disturbed youth. Moreover, the lower court by its order refused generally to distinguish between the mentally retarded and the emotion-

[19] Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Cal. L.R. 840, 877 (1974).

[20] *Ginsberg v. State of New York,* 390 U.S. 629, 648 (1968) (Mr. Justice Stewart concurring).

ally ill, and infants and teenagers, even though legal and practical considerations vary greatly for each group. [21]

2. In order to strike the proper balance between the interests of the parent and child, it is first necessary to briefly survey the contours of the Due Process Clause as it has been applied with respect to each. From this we will be able to determine whether the Due Process Clause limits the traditional role of the parent in the area of mental health where it does not in the provision of other recommended health services for his child. Moreover, this analysis will reveal that there is no basis for the finding below with respect to the child's due process rights in this area.

The rights of parents to direct the upbringing of their children has been given great deference in this Court. That is as it should be, for parents are presumed to act in the best interests of their children. Thus this Court noted in *Stanley v. Illinois,* 405 U.S. 645 (1972), at 651:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson,* 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska,* supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma,* supra, at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

[21] The special problems of the mentally retarded are specifically excluded from consideration in the discussion of this due process issue in *On the Voluntary Admission of Minors,* 8 Mich. J. of Law Reform, pp. 189, 192, n. 18 (Fall 1974). Also, see discussion of *Saville v. Treadway,* 404 F. Supp. 430 (M.D. Tenn. 1974), infra at p. 48 of this brief, which is a case similar to this. That court made broad exceptions in its order to accommodate the special needs of mentally retarded children.

The strength of these rights cannot be measured in a vacuum, however. For rights which are given a priority in one situation may be treated differently in another situation when competing interests are even more compelling. A review of those cases where parental authority over their offspring has been in issue makes clear that each case concerned attempts by a state in one way or another to intrude into this sphere of parental authority. In *Wisconsin v. Yoder,* 406 U.S. 205 (1971), this Court found that ". . . [the] primary role of the parents in the upbringing of their children . . ." *id.* at 232, predominated over the State's admittedly strong interest in compulsory public education, at least with respect to the last two years of required schooling. Similar results were reached in *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). By contrast in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158 (1944), the guardian's interest in that regard was not found to be superior to a state law forbidding street peddling of religious materials by children.

The rights parents enjoy in their children generally flow from their parental duties.[22] *Meyer v. Nebraska,* 262 U.S. 390, 400 (1922). Surely one of the highest duties of parenthood is protecting the health of one's children. This duty is certainly as important as the parental interest in directing the education of one's children. *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Pierce v. Society of Sisters,* supra; *Meyer v. Nebraska,* supra. So compelling is this duty that the state will not interfere with a parent's actions in this regard unless a life threatening situation has been created for the child by the parents' actions or inactions. *In Re Green,* 448 Pa. 338, 292 A.2d 387 (1972); *In Re Seiferth,* 309 N.Y. 80, 127 N.E. 2d 820 (1955); cf. *Bykofsky v. Middletown,* 401 F. Supp. 1242 (M.D. Pa. 1975). Similarly a state's interest in the education of its children, described by this Court as being "at the very apex of the functions of a State" is not paramount to the rights of parents to provide alternative education for their children. *Wisconsin v. Yoder,* supra at 213.

These parental rights are, of course, an essential element of a general familial right of privacy which has been given special recognition by this Court. Thus Mr. Justice Blackmun noted in *Roe v. Wade,* 410 U.S. 113 (1972):

> [The] decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty", *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make

[22] Implicit in the recognition of parental duties is the power to perform those duties. Kleinfeld, "*Balance of Power Among Infants, Their Parents and the State*"; 4 Fam. L.Q. 410, 413 (Dec. 1970).

> it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird,* 405 U.S. at 453-454; *id.* at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); and child rearing and education; *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer v. Nebraska,* supra. *Id.* at 152-3.

3. In this case the plaintiffs' parents sought psychiatric in-patient therapy at Haverford Hospital for their children. After a complete medical examination, each of the plaintiffs was admitted for treatment.[23] Subsequently, each child objected to this type of medical treatment and expressed those objections by this lawsuit.[24] However viewed, this case directly challenges the general right of parents to authorize medical care which has been medically recommended for their children against the child's wishes. This challenge to parental authority has been predicated on the child's asserted rights to due process of law.

Generally, the type of situation that will provide a sufficient basis for the state's intervention into the parent-child relationship involves an abdication of responsibility toward the child by the parent. Examples of this type of

[23] The testimony of Dr. Barbara Armstrong of Haverford State Hospital indicates that, in fact, each of the plaintiffs did receive a psychiatric examination prior to admission which was, and still is required by Sections 402 and 403 of the Act (109a).

[24] Under the regulations enacted shortly after this lawsuit was commenced each of the plaintiffs would be furnished counsel and provided a hearing to challenge their continued institutionalization. See pages 9-15, supra.

intervention by the State are child abuse proceedings, neglect proceedings and ultimately proceedings to terminate parental rights altogether. *Prince v. Massachusetts,* 321 U.S. 158, 166 (1943); *In Re Stuart,* 114 F.2d 825 (D.C. Cir. 1940). Also included in this category are situations where the parent is effectively foreclosed from assuming his traditional role of responsibility, such as in the area of public education, e.g. *Baker v. Owen,* 395 F. Supp. 294 (M.D.N.C. 1975); *Sims v. Waln,* 388 F. Supp. 543 (S.D.O. 1974) (involving State's power to discipline children in public schools); compare *Glasser v. Marietta,* 351 F. Supp. 555 (W.D.Pa. 1972).

This case presents a conflict between recognized rights of parents and due process rights claimed by their children.[25] The conflict is between the parent's power to authorize medical treatment for his child which has been recommended by a physician and the child's asserted right to refuse that treatment. By its decision, the lower court found that this parental authority was outweighed by these misperceived due process rights of the child.

4. In finding that these children have a personal right of liberty superior to their parent's right to provide recommended medical care, the court totally failed to consider the parental rights. The lower court's decision did not address the question of whether or not the parental duty to provide for their children's health and welfare, and concomitant right to follow legitimate medical advice in that regard, would be intolerably compromised by this massive intrusion of state regulation sought and ordered

[25] See *Wisconsin v. Yoder,* 406 U.S. 205 (1972), and *Heryford v. Parker,* 396 F. 2d 393 (10th Cir. 1968), which specifically did not reach this confrontation.

in this case. Rather the court focused only upon the child's interests without regard to the parental rights involved. The finding that the plaintiffs were entitled to due process of law rested not on an analysis of the child's relationship with his parent but rather upon a nonexistent adversary relationship with the state. Viewing the question from that perspective the finding of these rights for the children is not surprising, but is nonetheless erroneous.

First the court found that the *state's* interest in "the family unit, [and] maintaining the rights of parents to the custody, care, and upbringing of their children . . ." (792a) was not sufficient to override the due process mandates of the Fourteenth Amendment. The court went further and determined that defendant's assertion that the state is acting ". . . as *parens patriae* and not as an adversary" (794a) ". . . ignore[d] that the child [was] involuntarily removed from his home . . ." (794a). This reasoning ignores two factors central to the case. First, even if the *state's* interest in "maintaining the rights of parents" is not compelling—what of the *parents'* interest in their rights to provide for their children's health? *Roe v. Wade,* 410 U.S. 113 (1972). Perhaps more importantly, the court decided the case without ever addressing the real issue when it dismissed the defendants' arguments as ignoring that the child was involuntarily removed from his home.[26] The removal was only involuntary from the child's point of view—it was, after all, the children's parents who initiated the admission procedure not the state. While a child may have due process rights *vis-a-vis* the state in a delinquency proceeding, *In Re Gault,* 387 U.S. 1

[26] The second part of this argument will deal more fully with the question of the child's due process rights in this situation.

(1966), those rights are not controlling when the child's loss of freedom is the result of a joint decision between his parent and doctor. *Roe v. Wade,* supra.

Moreover, the court's conclusion that a parent may not waive the constitutional rights of his child in this regard misses the point (798a). Surely if the state were to institute delinquency proceedings against a child it is very doubtful that a parent could legally waive his child's due process rights in those proceedings. But that is not this case. Here the court found rights for the child in one setting—state versus child—and applied those rights in a wholly different setting—parent and doctor versus child. [27] When a parent, with a doctor's advice, places his child in a general hospital for long term care such as physical therapy and the child objects, surely no one would suggest that the child is "involuntarily" removed from his home in a legal sense. But this is a very different situation than when the state seeks to remove the child from his home for rehabilitation as the result of a delinquency finding, and the rights of the child in the latter situation cannot be assumed in the former. Surely the law must view the relationship between a parent and his child differently than it views the relationship between the state and that child.

5. Finally the opinion and order in this case creates a presumption of child abuse when a parent accepts the

[27] This transplantation of rights is clear from the fact that the lower court relied for its finding of a due process violation on cases such as *Dixon v. Attorney General of Commonwealth of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971); *Lessard v. Schmidt,* 399 F. Supp. 1078, remanded 414 U.S. 473 (1974), redecided 379 F. Supp. 1376 (1974), remanded 421 U.S. 957 (1975), and *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974), all of which are state-versus-individual cases.

advice of two psychiatrists to seek institutional care for his child. The rather bizarre effect of this is that when a parent, however reluctantly, decides to seek and follow a doctor's advice recommending in-patient psychiatric care for his child, that parent must then *prove his case* against his child in a courtroom in order to secure the recommended treatment for the child. [28] These concerns were not addressed by the lower court because of its failure to perceive the case in its proper light. Due Process rights that exist in one situation are not necessarily transferrable to another. It is therefore necessary to view the plaintiffs' claim in the proper context: contrasted with the recognized right of parent to authorize medical treatment for his child, does the child have any rights to due process, and, if so, do they outweigh the rights of the parent?

C. Admission or Commitment of a Child to a Mental Facility Does Not Require a Hearing

1. The Due Process rights of juveniles have been the subject of relatively recent decisions in this Court.

[28] While there is some disagreement over this point it seems quite reasonable to assume that a full adversary hearing as has been ordered in this case will not enhance the family situation. Most of the expert witnesses agreed that such a hearing would be traumatizing for the child and the family (566a, 636a, 655a, 687a, 689a-690a, 697a-699a, 727a). See generally, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings,* 13 Fam. L.Q. 803 (1973-74). Certainly, all of these hearings will result in a diminution in the quality of services available inasmuch as the already limited resources of the mental health system will be severely taxed, *On The Voluntary Admission of Minors,* Univ. Mich. J. L. Ref. 189, 206 (Fall 1974).

However, these cases have all been attacks upon the procedures in delinquency proceedings instituted by the state rather than challenges to parental power. Nevertheless, the principle of overriding importance in these cases is applicable and enlightening here.

Juveniles' rights have been recognized by this Court in piecemeal fashion in a series of cases beginning in 1948 with *Haley v. Ohio,* 322 U.S. 596 (1948), and continuing through the decision rendered last year in *Breed v. Jones,* 421 U.S. 519 (1974). The clear trend of those decisions has been to require in juvenile proceedings carefully selected procedures, which procedures have been deemed essential to fundamental fairness in criminal proceedings for adults. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1970). This has been a disquieting process, for the Court has continued to recognize the implications of a more formal criminal justice system for juveniles. Thus, this Court in *McKeiver v. Pennsylvania,* at 545 avoided a "remake [of] the juvenile proceeding into a fully adversary process . . .". Nevertheless, the harsh realities of the unfulfilled aspirations of the present system, *Breed v. Jones,* supra at 528, and the essentially criminal nature of juvenile proceedings, *In Re Gault,* supra at 36, 50, have necessitated these reforms.

This Court has accordingly required that juveniles be afforded the rights of notice, counsel, confrontation and cross-examination in delinquency proceedings. *In Re Gault,* supra. Moreover, proof of delinquency must not meet the traditional heavy burden of beyond a reasonable doubt. *In Re Winship,* 397 U.S. 358 (1970). Similarly, in *Haley v. Ohio,* 332 U S. 596 (1948), and in *Gallegos v. Colorado,* 370 U.S. 49 (1962), coercive procedures

used in obtaining confessions from juveniles were ruled unconstitutional. However, this Court has not required that all rights constitutionally guaranteed adults charged with a crime be made available to juveniles similarly accused. In *McKeiver v. Pennsylvania,* 403 U.S. 528, 533 (1970), the Sixth Amendment right to trial by jury was not imposed upon the juvenile justice system.

2. The consideration of overriding importance which is derived from these cases is abundantly clear.[29] Procedures required in the adult criminal process which go to the integrity of the fact-finding determination, the "was it done and did the defendant do it" determination, have been generally imposed on the juvenile justice system. Thus, confessions elicited under questionable circumstances, normally of dubious reliability, became even more unreliable when extracted from a child. *Haley,* supra; *Gallegos,* supra. It was noted in *Gault* that "[w]ith respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence." *Id.* at 48. Similarly, the process by which the facts are determined in connection with a defendant's guilt or innocence is extremely suspect, as is the reliability of those facts found, if the defendant is denied the right to effectively challenge those findings through confrontation and cross-examination, with counsel's assistance. *Gault,* supra. And in further application of this principle in *McKeiver* this Court

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[29] *Breed v. Jones,* 421 U.S. 519 (1975), and *Kent v. U.S.,* 383 U.S. 541 (1965), dealt with the procedures which ultimately determine if a juvenile will be tried as an adult which is obviously unique to the juvenile system with no counterpart in the traditional criminal process for adults.

concluded that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function . . ." Thus, this Court held that the right to a jury trial was not required in a juvenile proceeding. *Id.* at 547.

3. Whether or not these types of fact-finding procedures are useful, of course, depends upon the types of facts sought to be determined and ultimately upon the overall purpose of that proceeding. Notwithstanding its label as a "civil proceeding", the determination in a delinquency proceeding is whether or not a particular youth has broken the law. *McKeiver v. Pennsylvania*, supra at 541. The question is "was it done" and, moreover, "did he do it?".

What then is the purpose of the juvenile commitment proceedings sought by the plaintiffs and ordered by the lower court in this case? The purpose is clearly not to determine "did he do it" as is the case in delinquency proceedings. Instead, the purpose should be to find out whether the child has a particular mental condition necessitating psychiatric in-patient therapy. This fact-finding process differs radically from that which is required in the delinquency proceeding.

The decision to institutionalize a child is medical in nature.[30] In Pennsylvania a child must be examined by at

[30] The plaintiffs will undoubtedly argue that voluntary commitments are really the result of a "did he do it" type of inquiry. However, in at least one study it was concluded that children were not hospitalized in order to sanction behavior which may be when a "did he do it" inquiry would apply, but rather for treatment of very serious mental conditions. Moreover, that study concluded that all treatment alternatives were explored before hospitalization was ordered. Rabinovitch, *Are Inpatient Hospital Services for Children Obsolete?*, 5 Michigan Mental Health Research Bulletin 3 (1971); see also Rabiner, Laurie, *The Case for Psychiatric Hospitalization*, 131 Am. J. Psychiatry 761 (July 1974).

Finally, the record in this case indicates that each patient was admitted on the basis of medical need and not as punishment for errant behavior. And in this regard the expert testimony of Dr. Derek Miller points out that psychiatrists and not lawyers and judges are best suited to define the medical needs of the patient (689a).

least two psychiatrists independently of each other, and both must agree on the need for in-patient institutional care before the child can be admitted to an institution. This inexorably leads to the conclusion that the critical "fact-finding" in the process is a medical diagnosis rather than an adjudication of guilt or innocence. If judicial evaluation of a recommended medical treatment plan is the underlying purpose for which the adversary proceeding ordered below is intended—and surely it is—then the timeless description of the juvenile court system rendered sixty years ago by Roscoe Pound will equally befit the courts that participate in this venture. After examining the system of juvenile justice Professor Pound found it to be ". . . an enterprise originally designed to use power and authority of law to achieve ends not amenable to legal means."[31]

With a medical diagnosis in the mental health area, the key findings are not whether a particular event actually occurred and whether a certain person "did it". Rather the key is a medical determination predicated upon pro-

[31] Lemert, E., Instead of Courts, Crime and Delinquency: *National Institute of Mental Health* at 5 (1971) citing Roscoe Pound, the "Limits of Effective Legal Action", Twenty-Second Annual Report of the Pa. Bar Association, XXII, 1916, pp. 221-239.

fessional observations of behavior. This may or may not involve some factual determinations.[32] But just as courts do not insist upon second-guessing a medical diagnosis in the area of physical medicine, courts should be equally loath to do so in the area of psychiatry. Factual determinations are a part of the diagnostic practice in physical medicine no less than is the case in psychiatry. Thus, when a mother brings her two year old child to a doctor and explains the child's symptoms—mental, physical or both—a court hearing to check the accuracy of the doctor's diagnosis and recommended treatment is unwise, unwarranted, and without precedent.

4. Two factors have been generally regarded as a basis for treating the psychiatric recommendation for institutional care different than all other medical treatment plans, physical or psychiatric: First, the tenativeness of psychiatric conclusions, and secondly the nature and consequences of some treatments such as long-term institutional care, along with the stigma of being diagnosed mentally ill.

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[32] These factual determinations in some cases may even involve the accuracy of reports of various conduct that could be classified as delinquent or criminal (790a). And this conduct, or even reports of this conduct, may have been the impetus for a child's parents to seek psychiatric help. But that is not to say that the child is hospitalized because of these reports, for manifestations of mental illness or retardation are sought and detected in many ways by those who possess the proper psychiatric training.

Thus the lower court's statement that children were institutionalized for truancy may be no more accurate than the statement that a person had heart surgery for chest pains—surely the chest pains brought the patient to the doctor and such a notation would undoubtedly appear on his admission note—but that of course is not the whole picture (See testimony of Dr. Tashjian at 650a-652a).

The relative uncertainty of diagnosis in the area of psychiatry, is often exaggerated and sensationalized.[33] This relative uncertainty, however pervasive, only serves to emphasize the questionable wisdom of having judges, completely untrained in the field of psychiatry, issuing diagnoses, prescribing treatment, or even choosing between two conflicting diagnoses which might be created by conflicting expert opinions. The questionable value, if not harm, of this type of judicial prescription of treatment is aptly demonstrated in a recent study where it was noted, after observing many commitment proceedings, that the independent fact-finder never disagreed with the psychiatric opinions and recommendations.[34]

It will of course be argued that plaintiffs are not really seeking a medical diagnosis from the courts, but rather they only seek to make it more difficult to institutionalize a child. And they will further urge that their aim

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[33] See Roth, L., M.D., *Some Comments on Labeling.* Bulletin of the American Academy of Psychiatry and the Law at 7-8 (in press) which strongly criticizes Rosenhan's, *On Being Sane in Insane Places*, 179 Science 250 (1973), which is generally offered as proof of the total uncertainty of psychiatric diagnosis. *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Concurring Opinion, Chief Justice Burger), notes these persistent difficulties in the area of psychiatric medicine.

[34] Wengler & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. of Health & Social Behavior 66, 68 (1969). Moreover, Dr. Barbara Armstrong, a psychiatrist at Haverford State Hospital, testified that in her experience at Haverford she had seen only one real error in a medical diagnosis for institutional treatment, *and that followed a complete judicial hearing* (95a-96a). Most of the witnesses who testified in this proceeding agreed that interruption of the treatment process for the required hearing would be potentially harmful (95a-96a, 655a, 698a-699a, 543a-544a).

is to assure that other alternatives have been examined before commitment is ordered.[35] And finally, it is contended that a judicial hearing minimizes the possibility of a child being "railroaded" into an institution by ill-intentioned parents.[36] *Wengler and Fletcher*, supra, at 43, found that the presence of counsel at mental commitment proceedings increased the length of those proceedings and reduced the number of commitments. Thus, it is obvious that requiring a hearing and counsel will have an even greater effect along those lines. Studies have also shown that the more intervening evaluation procedures of any type that are required before admission generally result in a decreased institutionalization.[37] Those who would applaud that result, and there are no doubt some, would nonetheless misuse the judicial process to accomplish a social policy deemed by them to be desirable (de-institutionalization) through judicial rather than legislative means. The words of Professor Pound are well remembered at this point.

Undoubtedly, there are cases where parents have been successful in placing their child in an institution for the

[35] Dr. Henry Kandler, a psychiatrist and an expert witness for plaintiffs, felt that a hearing would make everyone "do a better job" and it may yield a "compromise" in treatment plans (543a-544a).

[36] Dr. Kandler testified that a hearing would militate against the "railroading" of a child into an institution by his parents (544a). This of course overlooks the required independent psychiatric examinations as well as the availability of habeas corpus and the present right to a hearing upon demand by a child over 13 years of age.

[37] Marsden, G., *Selection of Children for Residential Treatment: A Study of the Process*, 9 J. Am. Acad. Child Psychiatry, 332-46 (1970).

wrong motives. But is that the fault of the process or the parents? Assuming that the true motives of these unscrupulous parents would surface in a judicial hearing—what then? Surely the family relationship had long since broken down. Thus, the child's victory at the hearing is truly a pyrrhic one and the real problem has only been exacerbated.[38]

The second ground for urging that this type of an adversarial hearing is proper, notwithstanding the difficulties already alluded to, is the drastic consequences of institutional therapy.[39] Thus, the argument goes that because in-patient psychiatric therapy in an institution is accompanied by stigma and such a massive loss of liberty, all medical recommendations for such treatment must be scrutinized in a full adversary hearing. Likewise, the motives of the parent for concurring in this recommendation must also be judicially scrutinized, say the plaintiffs. First, the consequences of institutional treatment are surely less drastic than the course of treatment which was recommended in the celebrated case of *Matter of Quinlan*, 355 A.2d 647 (1976). Yet in that case the Supreme Court of New Jersey found that judicial second-guessing of that medical recommendation ". . . would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of com-

[38] There can be little doubt that such an adversarial proceeding would only heighten the obvious intra-family hostilities in a situation where parents would abandon their children. *Recognition and Protection of the Family Interests in Child Abuse Proceedings*, 13 J. of Fam. Law 803 (1973-74).

[39] No one would advocate judicial scrutiny of the role of a psychiatrist in prescribing medicine or psychotherapy for his patient in an out-patient setting.

petence, but because it would be impossibly cumbersome." *Id.* 669. Without minimizing the consequences of institutional care, and without drawing undue conclusions from a case that is in all likelihood, *sui generis,* the New Jersey Supreme Court's unanimous refusal to require judicial scrutiny of a medical recommendation with those drastic consequences is instructive. Moreover, it should again be pointed out that, in deference to this concern Pennsylvania has a mechanism whereby a child over the age of thirteen can at any time question, with counsel the propriety of his continued hospitalization.

A variety of assumptions underlie the argument that the psychiatric recommendation of institutional care, albeit prompted by parental concern, should be reinforced by a full judicial hearing. First is the notion that all mental institutions are primarily warehouses for the unfortunate, and exist for society's convenience rather than for the treatment of the mentally ill. Although the record in this case contains absolutely no evidence of the conditions at any of Pennsylvania's institutions, there no doubt may be some institutions in this country which arguably fit that definition. But as a result of the great influx of additional public funds in this area[40] and because of a heightened social awareness of these problems, this type of institution is rapidly becoming a thing of the past. The inescapable fact of the matter is that there are mental illnesses in today's world requiring institutional care. Any deficiencies in those institutions should be remedied by legislative and executive action, not by injecting purpose-

[40] In Pennsylvania legislative appropriations for mental health and mental retardation have more than doubled in the past six years ($210,182,757—1970, Act of March 4, 1971, P.L. 809, No. 3-A; $445,632,000—1976, Act of June 4, 1976, P.L. , No. 7-A.)

less judicial proceedings into the treatment process where none is required. Moreover, while it is unfortunately true that society still has not completely shed its unenlightened attitudes toward these unfortunate citizens,[41] this alone is not a sufficient basis to pre-empt parental decision-making authority in this important area. Put quite simply, substantive changes in the health delivery system should not be attempted through the means of requiring inappropriate legal procedures in the treatment process.

On the strength of these assumptions—that a medical recommendation for institutional care is more akin to a finding of guilt than it is a prescription for treatment, and that any doctor's order for institutional care is uniquely suspect in validity because of the envisioned consequences of such treatment—the lower court ordered severe intrusions into the decision-making authority traditionally reserved to parent and doctor, *Roe v. Wade,* 410 U.S. 113 (1972), all in the name of due process. Beyond the fact that the decision of the lower court is predicated upon an erroneous extension of the Due Process Clause, the order intended to implement that decision is, by its sweeping nature, fraught with difficulties (833a-842a).

[41] Regarding the stigma that is assumed to exist as a result of institutionalization see MacMillan, *The Mentally Retarded Label: A Theoretical Analysis and Review of Research,* 79 American Journal of Mental Deficiency, 241 (1974), where it was noted that there is generally no real conclusive evidence in the scientific community on the effects of labeling the retarded. Moreover, in that same issue it was pointed out that labeling is really only a controversy with the marginally retarded as opposed to the more severely retarded. Id. at 253. See also, Rowitz, *A Sociological Perspective on Labeling,* 79 American Journal of Mental Deficiency, 265 (1974).

5. Notwithstanding the fact that most of the assumptions which give rise to the lower court's suspicion of medical and parental recommendations for institutional care apply even less to the severely retarded,[42] the order here applies to that group as well. In this connection the plaintiffs' own witness pointed out that most of his concerns regarding institutional care did not apply to the severely retarded (605a). Moreover, as has already been pointed out at n. 41 supra, the stigma effect of institutionalization is really not a concern for the severely retarded.

Beyond the generalized negative effects of the order appealed from, its application will for all practical purposes put an end to at least one very valuable program for the mentally retarded. In Pennsylvania, as in many other states there exists a program of respite care for families with retarded children (840a). This program allows families to institutionalize their retarded child for a specified time to allow them to take a vacation from the constant need for attention and care that such a disabled child requires.[43] Thus, the Court in *Saville v. Treadway,* 404 F. Supp. 430 (M.D. Tenn. 1974), while also erroneously finding Due Process rights for children in this situation, at least excepted respite admissions from its order.[44] *Id.* at p. 437.

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[42] In Pennsylvania approximately eighty percent of institutionalized juveniles are mentally retarded (310a et seq., current estimate D.P.W.).

[43] The lower court's reference to a family institutionalizing their child so they could take a vacation is misleading until it is realized that such short term commitments are actually encouraged as part of an overall program in Pennsylvania discouraging long term institutional care (790a).

[44] In *Saville v. Treadway,* 404 F. Supp. 430 at 437 (M.D. Tenn. 1974), a case similar to this case, also excepted the severely retarded from the requirement of a full judicial hearing.

Ironically the net effect of this could quite conceivably be an increase in the long term institutionalization of mentally retarded children.

Secondly, the order in this case makes absolutely no distinctions based upon the age of the children. To a one year old child the value of a lawyer, hearing and all of the other trappings of due process ordered in this case is very questionable. Be that as it may, and notwithstanding the expert testimony to the contrary, the lower court has required the defendants to ignore the realities and blindly treat the one year old exactly as the seventeen year old is treated. Again, in *Saville,* the court's order distinguished between children sixteen and over for whom a judicial hearing might be required and those younger than sixteen who would only be entitled to a hearing before what amounts to a professional panel.[45] *Saville v. Treadway,* supra, at 437.

6. Finally it should be noted that while the overall theories of *Saville* and the opinion in this case are similar in their errant reasoning, the process found due in *Saville* arguably does not even rise to the level of protection being provided in Pennsylvania and found to be unconstitutional by the lower court. Thus in *Saville* the error of assuming the legal similarity between a delinquency proceeding and a commitment proceeding was not

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[45] The testimony of Drs. Tashjian and Miller—defendants' expert psychiatrists—agree that the area of thirteen years of age is a good dividing line for psychologically distinguishing between children too young to responsibly assert their rights and those whose objections might very well be reliable (672a). Compare Pennsylvania's regulations which provide counsel and a hearing for children over the age of thirteen upon their objection to continued care in the institution.

exacerbated by requiring judicial second-guessing of psychiatric diagnoses and recommended therapy.[46]

7. Since the underlying principle of *Gault* and its predecessors—assuring the integrity of the fact-finding process—is not applicable in this case, an obvious question is raised. Has too much been proven? Do not the same reasons which have been advanced to demonstrate the inappropriateness of a judicial hearing in juvenile commitments also apply to adult proceedings?[47]

The reason the two positions are not contradictory is the same reason that underlies the fact that an adult may consent to, or refuse recommended medical treatment for himself and a juvenile cannot. In this country an element of freedom is the freedom of a competent adult to accept or reject health services *Winters v. Miller,* 446 F.2d 65 (2d Cir. 1971). Accordingly, it has been noted that none

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[46] Compare *J.L. & J.R. v. Parham,* F. Supp. , No. 75-163 M.A.C. (M.D. Ga. February 26, 1976); stay granted, *Parham v. J.L.,* 96 S. Ct. 1503 (1976).

[47] E.g., *Heryford v. Parker,* 396 F. 2d 393 (10th Cir. 1968); *In Re Ballay,* 482 F. 2d 648 (D.C. Cir. 1973); *Bell v. Wayne County,* 384 F. Supp. 1085 (E.D. Mich. 1974); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon v. Attorney General of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971). Moreover, in *Specht v. Patterson,* 386 U.S. 605 (19), this Court noted that "[those] commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxtrom v. Herold,* 383 U.S. 107, and to the Due Process Clause." *Id.* at 608. Also note the concurring opinion of Mr. Chief Justice Burger in *O'Connor v. Donaldson,* at p. 580 where it is noted that ". . . involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason is a deprivation of liberty which the State cannot accomplish without due process of law."

of the states have laws which compel a physically ill individual to be involuntarily hospitalized solely because he needs treatment to protect his own welfare. *Developments In the Law: Civil Commitment of the Mentally Ill,* 87 Harv. L.R. 1190, 1216 n. 84 (1974). Moreover, no court has ever ordered a competent adult to accept such hospitalization and medical treatment solely for his own benefit. Compare *Application of President and Directors of Georgetown College,* 331 F.2d 1000 (D.C. Cir. 1964), with *Winters v. Miller,* supra. This freedom, like so many others, is unique to competent adults, and before it can be taken there must be due process of law.[48] Accordingly, an adult must be given a hearing before this freedom is involuntarily surrendered. The necessary counterpart to this freedom to refuse treatment is the power to authorize or consent to treatment. And as noted above, this power is also unique to adults. Eg. *Bonner v. Moran,* 126 F.2d 121, 75 U.S. App. D.C. 156 (1941). Similarly regulation of reading materials clearly protected by the First Amendment is permitted with respect to juveniles where such regulation would not be constitutionally permissible were it applied to adults. *Ginsberg v. New York,* 340 U.S. 629 (1969).

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[48] Some have raised the question of why mental illness is the only type of illness for which treatment is forcibly imposed, *Developments in the Law,* supra, at 1201-1228. The competence of the individual to refuse the treatment (the determination of which, it should be pointed out, *is* within the traditional adjudicatory role of courts) is surely paramount in the underlying rationale. See *Winters v. Miller,* supra. Be that as it may, and leaving aside the question of why competency is not the proper standard for commitment, it is sufficient to note that children have no claim to freedom to refuse needed and authorized medical care.

8. With all this in mind, we are confronted with the lower court's finding of a deprivation of due process in this case. Relying primarily on the rational of *Gault* the district court found a right that, as has been shown above, does not exist. That court read *Gault* and its progeny to require a hearing in this case to "enhance the possibility that truth will emerge from the confrontations of opposing versions and conflicting data" (793a-794a), quoting *In Re Gault*, supra, at 21. But in *Gault* this Court was trying to make a hearing procedure, essentially criminal in its purpose and effect, more fair to the accused. Here however, the court is *creating the hearing* to assure what it conceives to be a more socially acceptable medical diagnosis and mode of treatment. *Gault* never intended such a result. Medical treatment cannot be prescribed on the basis of one lawyer's presentation or another's cross-examination. This Court should heed the words of Professor Pound and not create an ". . . enterprise . . . designed to use the power and authority of law to achieve ends not amenable to legal means". Accordingly this Court should reverse the decision of the lower court.

II. The Order in This Case Violates the Eleventh Amendment and Alternatively, Violates the Rule of Preiser v. Rodriguez[49]

A. 1. The lower court, concluding that children were entitled to due process protections prior to hospitalization in a mental facility, ordered a full complement of

[49] This argument is made in the alternative and assumes that plaintiffs prevail on the merits of the case.

procedural protections.[50] In addition to this prospective injunctive relief the Court also ordered that children presently being treated in any of the state's mental facilities be discharged, released or recommited pursuant to the newly ordered procedures within four months.[51] The validity of this portion of the lower court's order is questioned here.

2. The Eleventh Amendment[52] was proposed and ratified in the wake of this Court's opinion in *Chisholm v. Georgia*, 2 Dal. 419 (1793) which held that the State of Georgia was not immune from a contract action in federal court by a citizen of another state. There were generally two reasons for this Amendment. First the states were fearful that they would become fiscally unsound and unstable if their creditors' could sue and obtain judgments against them in the federal courts. Secondly, the notion of federal courts having this type of broad jurisdiction was contrary to commonly held beliefs of the states' sovereignty.[53]

Since its ratification two years after *Chisholm* there have been a variety of interpretations of the Eleventh Amendment "and the difference between the type of relief barred by the Eleventh Amendment and that permitted by *Ex Parte Young* will not in many instances be that be-

[50] This order is fully set forth at 843a-852a of the appendix.

[51] See paragraph 15E of the final order at 851a-852a.

[52] The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[53] *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. R. 1875, 1877-78 (June 1975).

tween day and night". *Edelman v. Jordan,* 415 U.S. 651, 667 (1973). The Court's decision in *Ex Parte Young,* 209 U.S. 123 (1908), marks a significant development in this area. In that decision it was held that the Eleventh Amendment did not preclude injunctive actions against state officials. There the Attorney General of Minnesota relied upon the Eleventh Amendment and ignored an injunction restraining him from enforcing certain criminal statutes that were allegedly unconstitutional. In sustaining the lower court's jurisdiction and contempt citation, the Court held:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and be in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. 209 U.S. at 159-60.

3. The principle of *Ex Parte Young* has undergone some refinements[54] culminating in the decision of this Court

[54] *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682 (1948), held that an injunctive action brought against a state officer is barred if the action of the officer is not alleged to be either unconstitutional or beyond his statutory authority. Even then if the relief requested would require "affirmative action by the sovereign or the disposition of unquestionably sovereign property" the action ". . . may fail, as one against the sovereign." Id. at 691, n. 11. See generally, Mahon, M., *The Eleventh Amendment and Retroactive Welfare Benefits,* 36 U. of Pitt. L. R. 78, 91, n. 55 (Fall, 1974), for other cases dealing with the Eleventh

in *Edelman v. Jordan,* 415 U.S. 651 (1974). And it is the proper construction of that opinion that will ultimately resolve the present issue. In *Edelman* the plaintiffs alleged that certain of Illinois' public welfare regulations violated federal law and resulted in undue delay in eligible applicants' receipt of benefits. After finding the State's regulations to be in violation of federal law the District Court prospectively enjoined use of the regulations. In addition the trial court ordered that the defendant state officials "release and remit . . . benefits wrongfully withheld" during the period in question. *Edelman,* supra, at 656. It was this retroactive relief that the Court found offensive to the Eleventh Amendment. And, defendants contend that the same principles which formed the basis of that conclusion in *Edelman* exist any apply in this case.

This Court in *Edelman* found two aspects of that retroactive relief offensive to the Eleventh Amendment. First it was noted that the funds to satisfy the award would inevitably come from the general revenues of the state rather than from the individual defendants. *Edelman* supra, at 664-665. And secondly, it was noted that the fiscal impact of this award was not merely ancillary to, and the necessary result of ". . . compliance with [a] decree which by [its] terms was prospective in nature." *Id.* at 668. After noting these characteristics of the retroactive aspects of the relief this Court held that ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective injunctive relief* (cite omitted) and may not include a retroactive

Amendment barring relief of an affirmative nature. Affirmative action on the part of the defendants was definitely ordered in this case.

award which requires the payment of funds from the state treasury." *Edelman,* at 677 (emphasis added).

As in the *Edelman* case there can be little doubt that compliance with the retroactive order in this case will require substantial sums of public funds, and will severely disrupt the fiscal structure of the state in this area.[55] Moreover it is obvious that the state treasury will be the source of the moneys to carry out this order.

In *Edelman* the order of the court was both retroactive[56] and injunctive as is the case here. It is true, of course, that in *Edelman* the defendants were retroactively required to provide monetary benefits wrongfully withheld whereas in this case the defendants were retroactively required to provide procedural safeguards to those who had previously not received them.

[55] *Edelman,* supra, *id.* at 666, n. 11, reflects this Court's concern for the disruptive effects of awards of retroactive relief:

> It is not necessarily true that "[w]hether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same." *Post* at 682. This argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

[56] Any arguments that Paragraph 15E of the order below is somehow not retroactive can also be made with respect to the order in *Edelman.* Thus it has been argued in commenting in *Edelman* that "the federally-imposed retroactive payments [c]ould be seen as an ancillary effect of the prospective order to the officer to conform his conduct to federal law." The same strained assertion could and probably will be made in this case—that the fiscal impact of the requirements for those children already committed is only ancillary to a prospective order.

The question then becomes whether a retroactive injunction against a state violates the Eleventh Amendment only if it involves specific monetary relief. Such a narrow holding would ignore the bases for the Eleventh Amendment. First, most state programs involve the dispensation of services rather than funds to the public, and if this distinction is to control then the bulk of state governmental activity would be completely vulnerable to this type of severe disruption as a result of sweeping retroactive injunctions issued by a federal court.[57] Secondly and more importantly the disruptive effects, fiscally and governmentally, of broad retroactive injunctive relief is no less drastic than a straight monetary award.[58] *Attorneys' Fees and the Eleventh Amendment,* 88 Harv. L.R. 1875, 1880, n. 36 (June, 1975). In many cases such relief would be more disruptive than a "lump sum" damage award. No better example of this can be found than the instant case.

Moreover the principle of *Ex Parte Young* is not forsaken by reversing this portion of the lower court's

[57] The lower court also gave the state the "alternative" to release or discharge all of the children and cease all voluntary admissions. This is no alternative for to do so would be nothing short of total abdication of the Commonwealth's responsibilities to those children and their families.

[58] If this type of retroactive relief is permitted to stand then in a successful suit, for example in the medicaid area, the state could then be ordered to approve services retroactively regardless of the plaintiffs' current eligibility for those services. This type of relief is essentially the same as that ordered here and its obvious disruptive effects need not be elaborated upon.

order. Clearly if the plaintiffs' theory of constitutional law is correct in this case then the prospective injunctive award entered by the lower court completely assures the supremacy of that law in Pennsylvania. Cf. *Linkletter v. Walker*, 381 U.S. 618, 625 (1965). But what such prospective relief does not do is require the state to expend vast amounts of finite resources to provide certain procedural rights retroactively, regardless of the actual desires of the child involved.[59] Whatever the lower court's rationale[60] for such an order it runs afoul of the Eleventh Amendment.

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[59] As will be discussed more fully in the next section every child hospitalized in a Pennsylvania mental facility *always* has the right to contest the validity of his confinement by way of habeas corpus, and as noted previously, children over thirteen years of age need only object to their continued hospitalization and they will be provided counsel and a hearing. See 9-15, supra.

[60] In view of the lower court's heavy reliance on *In Re Gault* for its conclusion that the due process clause applied in this case, it is probable that the retroactive relief was premised upon a theory of retroactivity drawn from the area of criminal law. This Court has pointed out that where the primary purpose or effect of a new constitutional doctrine is to rectify the truth-finding function and the accuracy of the guilt determination it will be applied retroactively. *Williams v. United States*, 401 U.S. 646, 653 (1970). There are two problems with this approach here, first the medical determination of need for hospitalization is not an adjudication of guilt and therefore is not likely to be affected by new procedural rights. Secondly the medical determination is *always* open to appropriate scrutiny as opposed to a finding of guilt in a criminal case. See generally, Argument I(B), supra. See also, *Lemon v. Kurtzman II*, 411 U.S. 192 (1973) where this court declined to give retroactive effect to its earlier decision declaring a state law unconstitutional. This Court emphasized that "the effect of a given constitutional ruling on prior conduct is subject to no set

B. The Retroactive Aspects of the Lower Court's Order Violates the Principle of Preiser v. Rodriguez

1. Any person, regardless of age, has a specific statutory right to petition for a writ of habeas corpus to test the validity of his confinement in a mental facility in Pennsylvania.[61] 50 Pa. Stat. Ann. §4426, supra at pp. 8-9. The plaintiffs in this case chose not to utilize this remedy but rather elected to institute this federal action under 42 U.S.C. §1983. The single issue in this regard is whether this was proper under the principle laid down by this Court in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), or whether the plaintiffs were required to pursue their state remedy. It is defendants' position that while plaintiffs' claims for prospective injunctive relief may have been appropriate in a §1983 action *Gerstein v. Pugh*, 420 U.S. 103, 107, n. 6 (1974), their request for a retroactive injunction to apply to children then hospitalized was improper and the court's order to that effect should be reversed. See e.g. *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975).

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principle of absolute retroactive invalidity . . ." *Id.* at 198-199. The Court further stated that this modern approach to the question was applicable in both civil and criminal contexts.

[61] If the plaintiffs were required to utilize the remedy of habeas corpus then 28 U.S.C. §2254(B), requiring exhaustion of state remedies, would apply. That section provides as follows:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

In *Preiser* several state prisoners brought a §1983 action alleging that they were unconstitutionally deprived of good conduct-time credits. They sought injunctive relief to compel the restoration of these credits which would have resulted in their release from prison. After noting various examples where habeas corpus was the appropriate remedy the Court noted that "in each case [the petitioner's] grievance is that he is being unlawfully subjected to physical restraint . . ." Id. at 486.

Since it was clear that the plaintiffs' complaint in *Preiser* challenged the legality of their physical restraint, Id. at 487, the only remaining determination was whether or not habeas corpus was the *exclusive* remedy by which they could proceed. This Court held that it was, and that therefore the plaintiffs' §1983 claims were barred for failure to exhaust their state remedies.

2. The federal exhaustion requirements apply to all cases where habeas corpus is an appropriate remedy. Thus section 2254(b) merely refers to ". . . a person in custody pursuant to the judgment of a state court." This clearly includes mental patients. Moreover, the fact that the plaintiffs in this case were technically not in custody "pursuant to the judgment of a State court" does not render the exhaustion requirement inapplicable. In *Preiser* this Court rejected a similar contention noting that an attack upon a state's administrative procedures by one seeking release is no less within the "core of habeas corpus" than an attack upon a prisoner's conviction ". . . for it goes directly to the constitutionality of his physical confinement itself . . . ." Id. at 489. Moreover habeas corpus was available to the plaintiffs in this case and in fact, would have been a complete remedy. E.g. *Heryford v. Parker,* 396 F.2d 313 (10th Cir. 1968); *Hartmann v. Scott,* 488 F.2d 1215 (8th Cir. 1973).

The plaintiffs in this case were attacking the legality of their confinement. The complaint sought to enjoin the continued enforcement of the sole statute from which the defendants derived their authority to confine the plaintiffs (22a-23a). Moreover their claims were predicated upon their expressed desire to be released from confinement 12a, 14a-16a).[62] The plaintiffs were not challenging the conditions of their confinement, *Preiser,* supra at 498, nor did they seek damages.[63]

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[62] Compare *Gerstein v. Pugh,* supra at 106, 107, n.6, where the plaintiffs did not seek release from custody and, perhaps more importantly, the state law specifically precluded the use of habeas corpus to challenge that type of confinement.

[63] The complaint in this matter did originally request damages, however that claim was dropped midway in the litigation (23a). Even if the damage claim had not been abandoned this Court's holding in *Wolff v. McDonnell,* 418 U.S. 539 (1973), would also render the retroactive portions of the lower court's order invalid. In *Wolff* the Court noted that since damage claims were not available within a habeas corpus action, a prisoner's claim for damages was properly maintained under §1983 even if the determination of that claim required ancillary determination of claims that, standing alone, would be required to be brought by way of habeas corpus. The Court's opinion in *Wolff* makes it quite clear that any injunctive relief granted as a result of such an ancillary consideration must be prospective only, thus at 554-5 this Court held:

> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser.* But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under §1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411

The primary purpose for requiring exhaustion of state remedies is the concept of federal-state comity which is fundamental to "Our Federalism." *Younger v. Harris,* 401 U.S. 37, 44 (1971); *Preiser,* supra at 491. The lower court's order in this case ignored that principle by requiring complete retroactive application of its order.

3. Quite apart from the considerations of *Preiser,* without any constitutional necessity therefore, and without ever making the Pennsylvania judicial system a party to this action, the lower court ordered that the Pennsylvania Court system conduct the several thousand hearings necessitated by its retroactive order (838a-839a).

There can be no question that such a massive imposition upon the Pennsylvania Judicial System will cause a clash between the federal and state judicial systems.[64]

U.S., at 499, n. 14. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction *enjoining the prospective enforcement* of invalid prison regulations. (Emphasis added.)

[64] The Supreme Court of Pennsylvania, though not a party to this action, was so adversely affected by the retroactive aspects of the order in this case that the Chief Justice of the Pennsylvania Judicial System joined defendants' request for a stay of that order by telegram to each member of this Court. Moreover, the Supreme Court of Pennsylvania is presently seeking to leave to participate as *amicus curiae* in these proceedings to vindicate the state judiciary's interests in this matter. Fortunately the requested stay was granted by this Court. This has temporarily alleviated the undesirable result which could have arisen had the Pennsylvania Supreme Court—a non party—refused to so drastically disrupt its allocation of judicial resources to gratuitously accommodate this order.

Such a clash can only be justified in limited cases. State law and procedure must obviously conform to the requirements of the Constitution, *Miranda v. Arizona,* 384 U.S. 436 (1966). But in this case the lower court did not find that the constitution required a *judicial* hearing but rather that it required only a "hearing before an unbiased tribunal" (801a). A second possible justification for creating such friction between the two systems of government is equally inapplicable. Since no federal statutes are involved here this order was certainly not required by the Supremacy Clause. Thus it was clearly inappropriate for the lower court to order such a massive imposition upon the Commonwealth's Judicial System absent a basis founded upon a substantive constitutional violation. *Rizzo v. Goode,* 423 U.S. 362 (1975). Cf. *Lemon v. Kurtzman II,* 411 U.S. 192 (1973).

CONCLUSION

On the basis of the arguments and authorities contained in Argument I, defendants seek reversal of the decision of the lower court. In the alternative, defendants request that this Court vacate those portions of the lower court's order which require retroactive application for the reasons advanced in Argument II.

Respectfully submitted,
NORMAN J. WATKINS
Deputy Attorney General
BARRY A. ROTH
Assistant Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-1064

Jack B. Kremens, et al.,
Appellants
v.
Kevin Bartley, et al.,
Appellees

CERTIFICATION OF SERVICE

And Now, this 7th day of June, I, Norman J. Watkins, Deputy Attorney General for the Commonwealth of Pennsylvania, Counsel for Appellants, hereby certify that on June 7, 1976, I served the Brief for Appellants by placing one typed copy of that document in the United States Mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to David Ferleger, Esquire, 1315 Walnut Street, Philadelphia, Pennsylvania, 19107. I further certify that I served all parties required to be served.

NORMAN J. WATKINS
Deputy Attorney General